IN THE

Supreme Court of the United States

October Term, 1958

No. 34

WILLARD UPHAUS,

Appellant,

v.

LOUIS C. WYMAN, Attorney General,
State of New Hampshire,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR REHEARING

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Petitioner, Willard Uphaus, respectfully petitions for a rehearing in this matter decided on June 8, 1959. In support of the petition, petitioner respectfully shows and alleges:

A. The Court's affirmance of the judgment below is based upon its finding of "the 'substantiality' of New Hampshire's interest in obtaining the identity of the guests when weighed against the individual interests which the appellant asserts" (p. 6).[1]

This "substantiality", in turn, is based upon appellee's "valid reason to believe that the speakers and guests at World Fellowship might be subversive persons" (p. 6). Or, as the Court puts it: "Although the evidence as to the nexus between World Fellowship and subversive activities may not be conclusive, we believe it sufficiently relevant to support the Attorney General's action" (pp. 6-7).

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[1] Page references are to the slip opinion.

We propose to demonstrate that in drawing these conclusions the Court has been seriously misled by statements in appellee's brief and report to the New Hampshire Legislature.[2] There is no evidence whatsoever in the record of this case to show a "nexus between World Fellowship and subversive activities".

B. Secondly, the Court's decision is in conflict with many of its prior decisions, particularly during the last several Terms, which uphold the right of privacy and of association, which repudiate the doctrine of guilt by association, and which protect educational freedom. It is particularly difficult to reconcile the decision herein with that in *Sweezy* v. *New Hampshire*, 354 U. S. 234.

I

There was no evidence of subversive activities or persons at World Fellowship.

In a case predicated upon "valid reason" and "evidence" as to subversive activities, not only the opinion below but the record itself must be examined. The Court will perceive therefrom that the only testimony before the New Hampshire courts was that of appellant himself. Appellee's questions, oral arguments and report are not evidence.[3]

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[2] Appellee's oral reference to it in the trial court was unsuccessfully objected to by appellant (R. 61). That report, significantly not in evidence in this case, was submitted to the Court by appellee. Our comment upon it, set forth in the Appendix to our reply brief, need not be repeated here.

[3] Nor can the record be amplified by appellee's earlier examination of appellant in an independent proceeding not incorporated in this record. Such examination, if before the Court, would show that appellant made complete answers to questions about his own beliefs and activities and denied knowledge that any speakers at World Fellowship were or had been Communists. The record nowhere discloses that such was the case.

The record of appellant's testimony before the trial court referred to below cannot possibly justify this Court's conclusion that there might have been "subversive persons within the meaning of the New Hampshire Act" at World Fellowship (p. 6). For subversive persons are defined by the Act as persons attempting or advocating the overthrow of the Government by force or violence (*ibid.*). Appellee's criticism of appellant as a pacifist opening the door, by advocacy of non-violence, to the success of the Soviet Union and Communism is the antithesis of the conduct against which the statute is directed. It may be noted parenthetically that appellee's reliance upon this danger from the Soviet Union corroborates appellant's arguments that if a governmental interest were involved it would be federal, not state, in character.

From a rational point of view, only acts taking place at World Fellowship are material upon the issue of the alleged subversion among its guests. Appellant explicitly denied the existence of any "conspiracy" there (R. 64). But appellee showed a significant lack of interest in that subject, his questions being limited to such matters as the availability of radical or liberal literature,[4] a non-political film on vacations for Russian youth, and the saying of a grace at mealtime[5] (R. 77-78, 81-83).

The only speeches referred to in testimony were (1) that of Professor Gwynn Daggett "about civil liberties in New Hampshire," (R. 63); (2) that of Miss Florence Luscomb about her own interrogation by a Massachusetts investigating committee (R. 64); and (3) a religious "message from the prophet Isaiah on peace and good will," (R. 67); see also R. 87 on religious teaching.

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[4] Among such others as United States News & World Report and The New York Times (R. 65, 80).

[5] That this was "a toast to the Revolution" was denied under oath (R. 47, 87). If such trivia are all the evidence that appellee's informants could produce, the record here is, as Justice Brennan remarks, "very mild stuff indeed" (dissenting opinion, p. 10).

The guests are surely not proven subversive because appellant cannot expose them to appellee's mercy. The only *evidence* as to their character is appellant's uncontroverted description of them as "innocent" (R. 15). There is not even any evidence—in contrast to supposition—that any guest was in a "listed" organization.

Here is the testimony:

> "Q. Do you know Dr. Uphaus, whether or not they were members of any of these organizations?
> A. I think in some instances I did, but that was not on the registration card. We never asked, 'Are you or are you not a member of certain organizations?'" (R. 38)

The speakers' names were disclosed (R. 60, 95). Appellant did not know whether any speaker had ever been in the Communist Party (R. 39). Their correspondence with appellant was innocuous (R. 54, 84, 85). There was no correspondence with the Communist Party (R. 73). It was "possible" that some were in "listed organizations" (*ibid.*, R. 61, 64). The reference of the Court below to the large number of speakers in "cited" organizations nowhere is borne out by the record.[6] This is indeed a case where the findings both in New Hampshire and in this Court are based upon the arguments of opposing counsel, not upon the record itself.

Whether the facts, if proven, would have been relevant is the subject of our next point.

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[6] When asked whether one speaker was a member of a cited organization, appellant said, "I think I recall that she was cited as having had those connections" (R. 61). There is one other identification of a writer of an article (R. 66).

II

The Court's decision is in conflict with its decisions in numerous cases including *De Jonge, Joint Anti-Fascist, Sweezy, NAACP* and *Ullmann.*

A. Sanctions Based Upon the "Lists"

New Hampshire's finding of a nexus is based essentially upon alleged connections with organizations upon subversive lists compiled by the House Committee on Un-American Activities [7] (herein called the House Committee) and the Attorney General of the United States (herein called the Attorney General). This Court apparently agrees (p. 7).

This Court in *Barenblatt* v. *United States of America*, October Term 1958, No. 35, upheld the broad powers of investigation of the House Committee. But the instant case adds to these powers the very different function of establishing "probable cause" for conduct by the Attorney General of New Hampshire. We submit that if the appellee lacked power in the absence of "evidence as to the nexus between World Fellowship and subversive activities" (pp. 6-7), the House Committee's clearly unlawful subversive list could not constitute such "evidence" and supply the missing power.

The situation is aggravated by the state court's reliance upon membership in organizations on the Attorney General's list (R. 96, 99). It is true that this Court recognized that the list has the "limited purpose of determining innocence for federal employment" and that "guilt by association remains a thoroughly discredited doctrine" (p. 7). Nevertheless, it indubitably relies upon such a list, stating

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[7] The House Committee's lists, which have no legislative basis, of course, are even more informal than those of the Attorney General and consist of its accusations made in Committee hearings, reports and press releases.

that "the investigatory power of the State need not be constricted until sufficient evidence of subversion is gathered to justify the institution of criminal proceedings" (*ibid.*).

This last statement implies that membership in organizations on the list is *some* evidence of subversion. To recall the purposes of the Attorney General's list, its standards and underlying procedures (*and that no organization on it has been held by due process after a judicial hearing to be subversive in fact*), is to be appalled at the new destructive power given to the list. Such reliance upon the Attorney General's list is to disregard this Court's decisions in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123 and *Barsky* v. *Board of University of State of New York*, 347 U. S. 442.

In the first case Mr. Justice Frankfurter, concurring, noted that

> "designation has been made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion upon which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization are innocent." (p. 161)

In *Barsky*, Mr. Justice Frankfurter, dissenting, stated:

> "If the Regents had explicitly stated that they suspended appellant's license or lengthened the time of the suspension because he was a member of an organization on the so-called Attorney General's list, and the New York Court of Appeals had declared that New York law allows such action, it is not too much to believe that this Court would have felt compelled to hold that the Due Process Clause disallows it. See *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 104 F. Supp. 567.";[8] (347 U. S. at 471)

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[8] The decision of the Court was based upon the conclusion that the Board of Regents "was not influenced by the character of the Refugee Committee" (347 U. S. at 455).

B. Sanctions Based Upon the Privilege

Appellant's assertion of his constitutional privilege before a congressional committee was also regarded as evidence of subversion by the court below (R. 99).[9] The subsequent amendment of its opinion (R. 114-115) cannot derogate from the fact that its conclusion was in fact based upon an inference deemed constitutionally impermissible by this Court. *Ullmann* v. *United States*, 350 U. S. 429.

New Hampshire did precisely what this Court through Mr. Justice Frankfurter warned against in *Ullmann*: "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers" (350 U. S. at 426).

C. Guilt by Association Rejected and Applied

Appellee's theory, apparently accepted by this Court, is that the presence of political "undesirables" can render suspect even a lawful assembly. This doctrine cannot be squared with the considered refusal of the Court in *De Jonge* v. *Oregon*, 299 U. S. 353, to infer De Jonge's guilt from his presence at an avowedly Communist meeting.

The Court's acquiescence in the doctrine that guilt by association may be inferred at least to justify loss of the constitutional right of privacy is indicated by the following language: "The record reveals that appellant had participated in 'Communist front' activities. * * * " (p. 7). We have already indicated that the "record" reveals no such thing unless appellee's unsworn arguments and reports are the equivalent of testimony (*supra*, pp. 2-4). We note with respectful surprise the Court's use of this polemical term not hitherto in the judicial lexicon. Is "Communist front" to be added to such other vague and undefined terms as "subversive," "un-American" and "unpatriotic?"

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[9] This is another example of imparting into the case matters not of record. If testimony on the point had been taken, appellant would have had an opportunity to explain his position.

Surely such invidious and undefined terms open the floodgates for substituting adjectives for proof to the ultimate destruction of the guarantees of freedom of association of the First Amendment.

D. The Attempted Distinction Between This Case and Sweezy.

One sentence was used to dispose of *Sweezy* v. *New Hampshire,* 354 U. S. 234, which we had believed controlling: "First, the academic and political freedoms discussed in *Sweezy* v. *New Hampshire, suprâ,* are not present here in the same degree since World Fellowship is neither a university nor a political party" (p. 5).

Academic freedom is not limited to institutions that give degrees. World Fellowship "is a center for educational and religious purposes" (R. 70). Its right to teach and its guests' right to learn are on the same constitutional level as New Hampshire's university and those connected with it. Indeed, Socratic education had its origins not in an incorporated university but in the streets of Athens. Emerson said: "My pulpit is the lyceum platform" (Bradford Smith, *A Dangerous Freedom,* 1954, p. 179). Today "[t]he informally organized impulse to better ourselves by deliberately providing all men and women with chances to grow and learn, this movement called adult education touches the lives of Americans at many points" • • • (Lyman Bryson, *The Drive Toward Reason* (1954), p. 93).[10]

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[10] See also Johann Heinrich Pestalozzi, *The Education of Man* (1951), p. 32; M. T. Harrington, Pres., Agric'l. & Mechanical, Texas, *Commencement Address,* June 1952; Edward A. Fitzpatrick, Pres., Mount Mary College, *Commencement Address,* June 1952; James Russell Lowell, *My Study Windows* (1884); W. G. S. Adams, Warden of All Souls College, Oxford, *Adult Education and Democracy,* American Association for Adult Education (1936), p. 7; Alvin Johnson, *Adult Education and Democracy,* American Association for Adult Education (1936); Jesse Steiner, *The American Community in Action* (1928); Alexis De Tocqueville, *Democracy in America* (1889).

We regard this case as even stronger than that of *Sweezy* in view of the religious nature of the program at World Fellowship. That aspect will be developed fully in the event of rehearing. At this point it is sufficient to remind the Court that religious institutions have been one of the most fertile sources of education in Western Civilization. There is no possible justification for depriving religious groups, informal though they be, of the right to self-education while upholding that right for secular institutions such as the University of New Hampshire.

While World Fellowship is not a political party, the political freedoms of Americans have historically been exercised by political assemblies and by associations with specific political and social objectives. Bradford Smith, *supra.* Such associations have been among the most useful instruments in the functioning of American democracy. Alexis De Tocqueville, *Democracy in America* (1889). World Fellowship was under investigation precisely because appellee claimed that it permitted political activities upon its premises. This is analogous to *Sweezy* where appellee argued that the Progressive Party (like World Fellowship) was infiltrated by Communists.[11]

E. New Hampshire's Interest in Invading Privacy

The Court described as "tenuous at best" the "associational-privacy" herein involved. It made a value judgment as to the different kinds of protection to be given to the National Association for the Advancement of Colored People, on the one hand, and to World Fellowship, on the

[11] Professor Sweezy refused to answer questions with respect to the Communist Party as such, a charge not made by appellee against appellant herein.

other. We respectfully submit that such a judgment is beyond judicial competence.

The Court's opinion in *Barenblatt* and the concurring opinion in *Sweezy* suggest that the Communist Party is beyond the pale in that there is no right of privacy among individuals suspected of communism. *Uphaus* consigns to the same fate, first, organizations placed *ex parte* upon "subversive lists" and, then, World Fellowship, which is on no list except that now created by appellee.

The Court suggests that the "associational privacy" of the guests is to be lost because the camp was a public one maintaining a register of guests open to inspection of sheriffs and police officers (p. 8). The New Hampshire guest law is the familiar innkeeper statute designed for very different purposes than the current investigation; it does not authorize appellee or anyone else to examine, much less publish, the lists. The Court has correctly pointed out that "the lists sought were more extensive than those required by the statute" (p. 8, ftn. 7).

The function of the guest lists in the hands of appellee, *viz.*, the creation and publication of a new subversive list of suspected persons, is quite different from the inspection which the sheriff might make under the statute. The sheriff's right to inspect did not make the listing a "public record" available to every reader in New Hampshire and elsewhere of appellee's listing.

The Court suggests that "the governmental interest in self-preservation is sufficiently compelling to subordinate the interest in associational privacy herein involved" (p. 8). No one has yet suggested how exposure of the names of guests will protect New Hampshire's security. Appellee possessed the names of all the speakers; he claimed to have the names of many guests. Not a single one was subpoenaed in this investigation of World Fellowship. In what way would the addition of a few more names of guests aid the legislative process?

This Court indicated quite clearly in *United States* v. *Rumely*, 345 U. S. 41, constitutional doubts as to the compelled disclosure of the readers of certain literature. Is there any legal distinction between their status and that of the guests who came from the highways to lodge and learn at World Fellowship? The opinion herein appears to adopt the view of the Court of Appeals in *Rumely* that if the books involved in that case had been "left-wing" rather than "right-wing" their readers would have been unprotected (197 F. 2d 166, 173). We submit that this is a double standard—irreconcilable with the equality of treatment required by the Constitution.

CONCLUSION

There are issues of fundamental importance in this case. The Court's opinion represents a major shift from constitutional doctrine of the past. It is based upon an assumed "nexus" which is not only not supported by, but is contrary to, the evidence. We respectfully urge that we be granted the opportunity to present these issues more fully upon a rehearing of the case.

Dated, June 25, 1959.

Respectfully submitted,

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Certificate of Counsel

I, Royal W. France, do hereby certify that I am counsel for the petitioner herein and that this petition for rehearing is presented in good faith and not for delay.

Royal W. France.

June 25, 1959.